

JUSTICE IN MALAYSIAN SOCIETY: ISLAMIC FINANCE AND SOCIAL COHESION

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Abstract

The uniqueness of Malaysia is reflected towards its multi ethnicity society and how the society co-exists and accepting each other differences. History has shown that, harmonisation in Malaysian society is essential and should not be taken for granted. As a result, the government will always prioritize on the economy and social aspect in order to achieve peace and harmony among Malaysian. Therefore, by comparing the pertinent literature on Islamic finance and social cohesion theory, this paper seeks to illustrate the link between economy aspect pertaining to the Islamic finance and the social aspect on how its reflect justice to the whole society.

Keywords: Plural society, social cohesion theory, Islamic finance, Islamic banking

Introduction

Common understanding of harmony and national unity in Malaysia are the often used theories and concepts associated with the observations in the real world. However, if observations in the real world depict the Malaysian society in the future, then we cannot make assumptions or assumptions on which the above theory will become reality.

This can be seen from the behind the scene incidents of inter-ethnic conflict, in which the country is generally stable, prosperous and harmonious. National development, political stability and economic prosperity are achieved by modernizing and expanding the culture of middle-class life in the Malaysian society to the birth of a culture of openness in society which reflect the acceptance, recognition, honor and pride of a multi-cultural society (Mansor Mohd Noor et al. 2006). Malaysian, regardless of ethnicity, can share values to cross-cultural relationships built between them despite of the different backgrounds in terms of culture, language and religion.

However, in Malaysia, disputes do happen in a multi-ethnic group to challenge any imbalance or disadvantages in terms of social and economic aspect. Due to that, the economic aspect is one of the main

factors in satisfying those demands and creating harmonisation across the nation. By comparing the scope on Islamic finance and social cohesion theory, this paper seeks to describe the link between the economic aspect of Islamic finance and the society in order to seek justice for all.

The discussion of this paper is divided into four sections. Section 2 will describe an overview of Islamic finance in Malaysia. Section 3 explains the justice and equitable approach concerning Islamic banking. Section 4 describes the definition and concept of plural society, and its relation to social cohesion and lastly, the conclusion for this paper will be in section 5.

Overview of Islamic finance in Malaysia

Malaysia is one of the few countries which operate a dual banking system where the Islamic banking system operates in parallel with the conventional system. Islamic banking is one of the areas in Islamic finance which undergoes rapid growth in Malaysia. The Islamic banking system in Malaysia started in 1983 when the first Islamic bank, Bank Islam Malaysia Berhad commenced its operations. In the process of increasing the number of players in the system, rather than allowing a new Islamic bank to operate, the government

introduced a scheme known as the ‘‘Interest-Free Banking Scheme’’ in 1993 (Sudin Haron & Wan Nursofiza Wan Azmi, 2008). This scheme was often known as ‘‘Islamic windows’’ which allows existing conventional banks to introduce Islamic banking products to customers alongside their conventional banking services. This is following the successful setting-up of the first Islamic Bank and the increasing number of Muslims who wanted to realign more to Islamic practices in their economic activities.

On August 1st, 2013, the Prime Minister Datuk Seri Najib Tun Abdul Razak, has introduced the Islamic finance market to the world with the iconic brand identity, namely ‘Malaysia: Pasaran Kewangan Islam Dunia’. It marks another important milestone in the development of the Islamic finance industry in Malaysia.

Following the introduction of a new icon, the prime minister invited the global investment community to come and take full advantage of Malaysia's Islamic financial market which is being driven by a comprehensive regulatory framework, supervision, Syariah and comprehensive legislation. He said Malaysia wanted a more multi-currency transactions across borders being implemented in this country due to the regulatory framework, and syariah law established that provide a conducive environment to potential users of Islamic finance (Berita Harian : 2 August 2013).

There are more than 40 different Islamic financial products and services that are offered by the banks using various Islamic concepts. Some of the products are such as:

Wadiah Yad Dhamanah is a savings with guarantee. It refers to goods or deposits, which have been deposited with another person, who is not the owner, for safekeeping. As *wadiah* is a trust, the depository becomes the guarantor and therefore guarantees repayment of the whole amount of the deposits, or any part thereof, outstanding in the account of the deposits, when demanded. *Ar-rahnu* (collateralized borrowing) refers to an arrangement whereby a valuable asset is placed as collateral which may be disposed in the event of default. *Mudharabah* is profit-sharing which refers to an agreement made between a capital provider and another party (entrepreneur), to enable the entrepreneur to carry out business projects, based on a profit sharing basis, of a pre-agreed ration. In the case of losses, the losses are borne by the provider of the funds.

Next, *Musarakah* refers to a partnership or joint venture for specific business, whereby the distribution of profits will be apportioned according to an agreed ratio. In the event of losses, both parties will share the losses on the basis of their equity participation. *Ijarah* (leasing) refers to an agreement under which the leaser

leases equipment, building or other facilities to a client at an agreed rental against a fixed charge, as agreed by both parties. *Bay' Bithaman Ajil* (deferred payment sale) refers to the sale of goods on a deferred payment basis at a price, which includes a profit margin agreed to by both parties.

In brief, the Islamic financial products and services or in other words, ‘Islamic banking’ is based on Syariah principle. To understand the essence of the Islamic banking, one must understand the relationship between Islamic banking and Syariah. Syariah is not merely a collection of dos and don'ts nor it is just a code of criminal laws prescribing punishments for certain crimes. Even though its contain both, its encompassing the totality of man's life. It embraces devotions, individual attitude, social norms and laws which include political, economic and social.

The Islamic banking itself too falls under economic activities. An Islamic economic is a market which guided by moral values. Islam differs essentially from capitalism and socialism in the nature of ownership. Islam has given detailed regulations for economic life, which is equal and fair. Hence, economic activities are based on the principles of cooperation and responsibility that are ethical and aimed at establishing a just society wherein everyone will become responsible and honest.

The justice and equitable approach

Aristotle had defined justice as avoiding too much or too little in the distribution of things and readjusting and compensating where the balance has been disturbed. The two aspects of justice, in which are corrective justice and distributive justice in this definition both comprehend of justice as a social concept as it incorporates social relations and would have little meaning if it were to apply to an individual in total isolation from society (Dias, 1985). According to Mohammad Hashim Kamali (1999), justice and equality are, however, not identical in the sense that under certain circumstances, justice may only be achieved through inequality or unequal distribution of wealth.

As we can see, the significant increase in various Islamic banking activities has given rise to more legal disputes that had to be resolved in courts. The number of such cases that were decided and reported has also increased and mostly concerning *Bay' Bithaman Ajil* product. For instance, the case of *Malayan Banking Bhd v Marilyn Ho Siok Lin*.

The facts of this case are about the defendant obtained an Islamic banking facility known as *Bay' Bithaman Ajil* (BBA) from the plaintiff in 2002. The plaintiff became a party to the sale and purchase agreement in place of the defendant for the purpose of

payment to the vendor the facility amount in the sum of RM500,000 and thereafter immediately reselling the property to the defendant at the sale price of RM995,205.64. As a security, the defendant charged her property and promised under the charge to pay the plaintiff the sale price of RM995,205.64 by way of 240 instalments of RM4,107 each. In 2003, the defendant defaulted in paying five instalments and as a result the plaintiff issued a statutory notice under section 148(1) of the Sarawak Land Code (Cap 81). The defendant contended that the amount owing should not be the sale price. For the plaintiff, it is a matter of reading the words in the annexure of the memorandum of charge and property sale agreement which state that upon default, the defendant is required to pay balance of the sale price which was RM928,589.12 as at 21 February 2005.

The court's decisions are as follows:-

(a) Even though the court is faced with such plain language in the clauses in Memorandum of Charge and Property Sale Agreement, the power of this court under s148(2) of the Sarawak Land Code (Cap 81) is a discretionary one as held in *Kuching Plaza Sdn Bhd v Bank Bumiputra (M) Bhd*. The words used in section 148(2)(c) Sarawak Land Code (Cap 81) are: -, and the court after hearing the evidence may make such order as in the circumstances seem just". These words empower the court with the flexibility to make any order even it means ignoring the terms contained in the BBA documents provided it is just in the circumstances.

(b) The court must have good reasons to ignore or rewrite the terms in the BBA documents. It involves the process of taking into consideration of 'all circumstances of the case' including the public interest, the peculiarities of the contract and the compliance of the terms by the parties.

(c) It would not be equitable to allow the bank to recover the sale price as defined when the tenure of the facility is terminated prematurely.

(d) The court granted an order of sale of the defendant's property to recover the sum of RM598,689.10 as at 31 May 2006 and profit per day thereafter at RM106.16 until the full settlement of the sum.

The next case is *Affin Bank Bhd v Zulkifli bin Abdullah*. The defendant bought a double storey link house and secured the loan under the Syariah principle of *Bay Bithaman Ajil* from the plaintiff who was his employer at that time for a sum of RM346,000.00. The financing was to be repaid over 18-year tenure by 216 monthly instalments and a charge was registered against the title. However, at the end of December 1997, the defendant resigned from the plaintiff bank and at his request, the financing facility was restructured whereby under the revised facility, the

selling price of the house was RM992,363.40, payable over a period of 25 years. No fresh set of documents was executed, although earlier, has been requested by the bank. After making several payments totaling RM33,454.19, the last of which was in June 2001, the defendant again defaulted. The plaintiff issued a notice of default in Form 16D of the National Land Code seeking the repayment of RM958,997.21. Subsequently, two actions were filed namely an order for sale and an order to recover such sums in the event of a deficiency in the proceeds of sale. The issue before the court was the actual amount that a customer has to pay to the provider of *Bay Bithaman Ajil* facility in the event of default, in this case, after having paid RM33,454.19 in instalments. The court granted the order for sale and reduced the amount of repayment based on the following reasons:-

(a) If the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure.

(b) The profit margin that continued to be charged on the unexpired part of the tenure cannot be actual profit. It was clearly unearned profit.

The learned judge in the case commented that a borrower under the conventional banking is better off than a purchaser in the Islamic banking system. This warrants consideration. The judge in this case had focus on aspect of Islamic banking facility and such observation should not just be ignored. A solution acceptable to Islam must be found. The primary aim of the Islamic economic system is to achieve humanity and justice. Therefore, banks are allowed to make a reasonable profit from its transactions but it cannot be allowed to exploit a buyer as it would ultimately cause hardship to the communities.

In later years, we can see that the courts had played vital role in avoiding exploitation and injustice. They can interfere in the contracts between the banks and their customers where they can readjust the contractual obligations judicially if the parties are unable to resolve disputes amicably. Judges too have the power to set aside a contract which is grossly unfair to one of the parties.

For instance, in the case of *Malayan Banking Bhd v Ya'kup bin Oje & Anor*, the plaintiff had granted the defendants a facility amounting to RM80,094.00 under *Bay Bithaman Ajil* to finance the purchase of a property. The defendants defaulted after paying the sum of RM16,947.62. The plaintiff sought an order for sale under s148(2)(c) of Sarawak Land Code to recover the sum of RM167,797.10 which on the face of it would be seen to be excessive, abhorrent to the notion of justice

and fair play when compared with the secular banking facilities.

The learned judicial commissioner in the said case made orders accordingly:-

(a) Islamic contract is subject to the Quranic injunctions and/or Islamic worldview. Hence, the court can on its own motion, decide the issue or alternatively call experts to give their views pursuant to s45 of the Evidence Act 1950 or pose the necessary questions to the Syariah Advisory Council for their views.

(b) Section 148(2) (c) of the SLC makes it mandatory to exercise equity and the court may not grant the order if it is going to be perverse to the defendants.

(c) The fact that *ibra'* is unilateral does not stop Islamic banks from voluntarily relinquishing part of their claim or the court upon default by the customer to demand that proper concessions be granted to the customer on equitable grounds.

(d) To obtain a just result, the court would give an opportunity to the plaintiff to demonstrate equitable conduct by filing an affidavit stating that upon recovery of the proceeds of sale, they will give rebate and also to specify the rebate. If the court is satisfied that the proposed rebate is just and equitable, it shall make an order for sale, otherwise, the court may make some other order as the justice of the case requires.

Abdul Rani (2007) gave his comments regarding the said case in an article. He stated that the learned judicial commissioner was in strong disagreement with some Muslim scholars on Islamic banking, and in 'mischievous manner' asserted that under the Syariah, 'if you agree to pay, you must pay'. It is to him 'hogwash within the framework of Islamic jurisprudence'. His opinion is that the Islamic administration of justice will never permit trader or venture capitalists to strip the loincloth of the borrowers.

Therefore this indicate that a different approach by the judges in deciding Islamic banking cases. Courts were seen to be interested in examining critically the underlying principles under *Bay' Bithaman Ajil* (BBA) agreements. Their discussion focused on whether the BBA was contrary to the Islamic principles or not; but nonetheless, silent on the validity and the legality of profits derived from such facility. They did not discuss the interpretation of Riba and did not declare the profit gained from the BBA as unlawful.

The justice and equitable approach emphasize on the concept of fairness and justice between contracting parties. According to the learned Hamid Sultan J in *MBB v. Ya'kup Oje 'When parties enter into an Islamic commercial transaction, it is always subjected to Quranic injunctions to act with justice and equity...more so in the fairness to ensure that the deal is completed as per terms and the need to mitigate the*

breach taking into consideration various principles, inclusive of the concept that says that excess profit is not permissible'. This approach was adopted in *MBB v. Marilyn Ho Siok Lin, Affin Bank Bhd v. Zulkifli Abdullah and Malayan Banking Bhd v. Ya'kup Oje & Anor* (Ruzian markom, 2013).

It goes to show that any economic activities that are being aligned with Islamic practices can be accepted by all.¹ Even though, the depth of discussion on the Islamic practice in Islamic banking is only being touched on basic principle. There are some aspects that must be carefully examined in order to be accepted by all.² We must examine and embrace the differences of cultures and religions of Malaysians in order to show that the practice of the Islamic finance can lead to justice for all.³

The definition of social cohesion

The real differences in Malaysia are its citizens, which consist of 214 ethnics, have differences in cultures and religions that are being practised freely without any interference from each other (Data from Jabatan Perpaduan Negara). Hence, the term of unity in diversity (*kesepakatan dalam kepelbagaian*) is introduced. However, even though the society in Malaysia clearly manifests diversity in society, the unity in diversity is far from being achieved.

The understanding of social cohesion is evolving within the concept of a plural society. The first concept of pluralistic society was presented by J.S.Furnivall (1948) after he conducted researches in Burma and Indonesia. This concept refers to a society characterised by divisions and conflicts between groups of people under the auspices of a political system.

According to Furnivall, social basis of a pluralistic society is made up of a mixture of various groups of people. On the political front, pluralistic society arises from colonial domination. In addition, another feature of pluralistic society is the absence of a society or common social will. This feature is a set of values agreed upon by members of the community as a way to control and guide their social behaviour.

Van Den Berghe (1967) also distinguishes social pluralism (which exists when a society is divided into groups on the basis of corporate culture) from cultural

¹ Surah AL-Nahl. (16:90) 'Good Commands justice and fair dealing'.

² Surah Al-Maidah (5:8) 'O you who believe, be upright for God, bearers of witness with justice'.

³ Surah Al-Mumtahanah (60:8) - with regards to relations with non-muslim, 'God forbids you not to do good and be just to those who have neither fought you over your faith nor evicted you from your homes'.

pluralism (which arises due to certain ethnic groups). He lists down a number of features known as society consensus values that with their absence from plural society will lead to conflict between different groups; autonomy or independence of the social system; and a compulsion and economic interdependence as a basis for social integration and political domination. Eventually, the relationship between clusters will be more secondary oriented, segmental, and utilitarian.

According to Horace M. Kallen, (1997) cultural pluralism focuses on three main propositions of human rights of psychophysical heritage. The three main propositions are evaluated based on positivism, valuable contribution, and the concept of “all men are born equal” in a cultural community. Yet, the concept of “all men are born equal” does not illustrate the real differences that exist in each culture in a plural society.

The recent studies by Shamsul Amri Baharuddin (2012), describes that the concept of unity in diversity has not been reached yet because such concept is defined as equality in the forms of race, religion, language, and one nation, which are not the present reality in Malaysian plural society. It is merely a perfect ambition that will not be a reality.

Despite the fact that unity in diversity is a very wonderful reality to achieve, essentially we Malaysian only realise and implement a different concept, which is “cohesion in diversity” or in other words “social cohesion”.

Shamsul had clarifies that the social cohesion consists of two context of social reality. Social reality is divided into two contexts: “authority-defined social reality” and “everyday-defined social reality”. The “authority-defined social reality” is based on the society that follows an objective that is considered to be a force that serves as guidance for the community. Social reality here is reflecting the power of the majorities and minorities in the society and the role of state.

Next, “everyday-defined social reality” describes that experience as an important aspect in determining the guidance to the community. Most of the concepts of “everyday-defined social reality” are oral experiences such as historical narrative, cultures and religions practice, and taboos (Shamsul A.B, 1996).

Conclusion

As we reflect, there are insight and explanation of the concept of unity and integration to be achieved by our country to seek justice in social cohesion in terms of Islamic finance.

As Malaysia progress to promising future, domestic Islamic financial institutions show encouraging growth with great chances to expand globally. With the experiences that were accumulated for more than 30 years, it is time to extend this

experience beyond the borders.

Islamic finance is defined as a financial service or product principally implemented to comply with the main tenets of Syariah (or Islamic law). In sequence with the main sources of Syariah, which are the Holy Quran, Hadith, Sunna, Ijma, Qiyas and Ijtihad.

Islamic finance is a consideration of justice, where a financial transaction should not lead to the exploitation of any party to the transaction.

While the objective of the conventional banking is to initiate the parties involved to achieve profit in any means necessary. This is include the practise of the forbidden transactions that is essentially being dispose its implementation in the Islamic banking practise. All the practise that are forbidden in Islamic banking are involve with elements of *riba*, *Gharar* and *Maysir*.

The aims and purpose of Islamic finance in society can mostly be categorized as to ensure the existence of adequate order; it provides resolutions to conflicts; it provides protections for individuals and their assets and it maintains the structured operation of the civilisation. The law concerning Islamic finance also plays an important role in the society. The law provides certain rules that control any private dispute, self-help or open-conflict that may occur in the society. Courts, tribunals, arbitrators are the main actors in creating a harmony and just resolutions in a society.

All in all, the aim and purpose of Islamic finance is parallel with the effects as described by Shamsul Amri Baharudin (2012) in his studies on ‘Social cohesion’ in Malaysia. The justification on Islamic finance and social cohesion theory in the society shows that relations between Islamic finance and social cohesion can reflect the social power of social reality in Malaysia. As the rights of middle class society (the majorities’ view) will be heard and prioritized by the government in order to manage the financial of the country. Consequently, the Islamic finance itself will essentially be affecting the aspects of social justice and equality of power within society.

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